IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-1241

[redacted]

In Re: ROGER S. HANSON,

[redacted]

PETITION FOR CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

_____ F. 2d _____ (9th Cir. 2-6-75)

No. 73-2151

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. _____

JESS CANCINO,

Plaintiff,

vs.

WALTER E. CRAVEN, Warden,

Defendant.

In Re: ROGER S. HANSON,

Attorney at Law.

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PETITION FOR CERTIORARI

TO THE

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FOR THE

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_____ F. 2d _____ (9th Cir. 2-6-75)

No. 73-2151

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW ROGER S. HANSON, Attorney at

Law, petitioner, and petitions this Honorable Court for a Writ of Certiorari to review that certain decision Cancino v. Craven. In Re: HANSON, _____ F. 2d _____ (9th Cir. 2-6-75), a copy of which is herewith attached.

OPINION BELOW

A copy of the opinion below, Cancino v. Craven. In Re: Hanson, _____ F. 2d _____ (9th Cir. 1975) is herewith attached as an appendix. This opinion was rendered pursuant to a Petition for Rehearing. The original action of the Court taken on November 12, 1974 was an order of Dismissal stating, "The appeal is dismissed as not timely." It was unpublished. The decision from which Certiorari is being sought was entered February 6, 1975.

JURISDICTION OF THIS HONORABLE COURT ON WRIT OF CERTIORARI

Under Rule 19 (b), Rules of the Supreme Court, and 28 U.S.C. 1254 (1) jurisdiction of this Honorable Court is invoked because:

1. The U.S. 9th Circuit has rendered a decision in conflict with the decisions of at least the U. S. 5th Circuit in that the U.S. 9th Circuit has ruled an attorney may not appeal an illegal direct criminal contempt of Court conviction if the sanction imposed has been exacted, but he can do so in the 5th Circuit. United States v. Camil, 497 F. 2d 225 (5th Cir. 1974); United States v. Schrimsher. In Re Butts, Attorney at Law, 493 F. 2d 842 (5th Cir. 1974); see also Sibron v. New York (1968), 392 U.S. 40.
2. The U.S. 9th Circuit has rendered a decision in conflict with the decisions of at least the U.S. 2d Circuit and the U.S. 5th Circuit in that the U.S. 9th Circuit has ruled inferentially, that it is not fatal to a

federal direct criminal contempt conviction for the District Judge to have failed to prepare, execute, and file of record the order of contempt required under Rule 42 (A), F. R. Crim. P. Pietsch v. President of the United States, 434 F. 2d 861 (2d Cir. 1970); United States v. Vano. In Re Schafer, 496 F. 2d 1195 (5th Cir. 1974); United States v. Schrimsher. In Re Butts, Attorney at Law, 493 F. 2d 842 (5th Cir. 1974).

3. The U.S. 9th Circuit has rendered a decision in conflict with the decisions of at least the D. C. Circuit and the U.S. 7th Circuit in that the U.S. 9th Circuit has inferentially ruled that it is not necessary to establish the existence of (1) attorney misbehavior, (2) occuring in the presence of or so near to a Court, (3) as to cause an actual obstruction to the administration of justice, (4) done with a wrongful intent in order to convict an attorney

at law of federal direct criminal contempt of Court. United States v. Meyer, 462 F. 2d 827 (D.C. Cir. 1972) and on remand United States v. Meyer. In Re Hirschkop, Attorney, 346 F. Supp. 973 (D.C. D.C. 1972); United States v. Seale, 461 F. 2d 345 (7th Cir. 1972); In Re Dellinger, 461 F. 2d 389 (7th Cir. 1972)

4. The United States Court of Appeals for the 9th Circuit has inferentially decided a federal question in a way in conflict with applicable decisions of this Honorable Court in that the U.S. 9th Circuit illegally permits indirect contempt Rule 42 (B) proceedings against attorneys to be handled summarily without notice, hearing, and opportunity to defend with counsel under Rule 42 (A), F. R. Crim. P. contrary to Cooke v. United States, 267 U.S. 517 (1925); In Re Oliver, 333 U.S. 257, 275 - 276; Johnson v. Mississippi, 403 U.S. 212, 215 (1971) and Taylor v. Hayes, 418 U.S. 488

(1974).

5. The United States Court of Appeals for the 9th Circuit has inferentially decided a Federal constitutional question in a way in conflict with applicable decisions of this Honorable Court in that it permits the delayed adjudication to a time when there is no need to preserve courtroom order and decorum of an alleged Federal direct criminal contempt of Court by a District Judge who has been emotionally embroiled, is biased, and who has lost his temper before commencing adjudication, the judge failing to recuse himself pursuant to Offutt v. United States, 348 U.S. 11; Mayberry v. Pennsylvania, 400 U.S. 455 (1971) and Johnson v. Mississippi, 403 U.S. 212 (1971).

6. The United States Court of Appeals for the 9th Circuit has so far departed from the accepted and usual course of judicial proceedings and/or has so far sanctioned such a departure from the mandates

of Rule 42 (A), F. R. Crim. P. by the United States District Court for the Central District of California in that it permits the District Court to coerce monetary "contributions" to local "funds" in order to avoid an attorney being incarcerated, thus diverting the money from the United States government where normal federal fines are placed. The exercise of this Honorable Court's supervisory power over the lower Federal Court system is thus required.

Further, petitioner invokes this Honorable Court's power to enforce rights guaranteed under the Sixth Amendment to the United States Constitution, to be informed of the nature and cause of charges brought against him; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

QUESTIONS TO BE RESOLVED AND REASONS FOR GRANTING CERTIORARI

1. As an issue under the supervisory powers of this Honorable Court over the Lower Federal Court System, whether Rules 42 (A) and 42 (B) of the F. R. Crim. P. and 18 U.S.C. 401 permit the use of the federal summary direct criminal contempt power to coerce contributions from attorneys to local "library funds" or "attorneys' funds, thus diverting these funds from the government; and unless an attorney illegally held in contempt so contributes, he will be sent to jail?

2. As an issue under the supervisory powers of this Honorable Court over the Lower Federal Court System, whether, if an attorney takes an appeal from an illegally imposed summary direct federal criminal contempt citation, with a coerced contribution sanction of money paid to an alleged "library" or "attorneys' fund," that attorney must carry the responsibility to:

   (a) ascertain the nature of the entity known as the "library fund" or "attorneys' fund" and whether

it has "trustees,"
and, if so,

   (b) make the "trustees" "parties to the appeal," in order to obtain relief,

especially where the Chief Judge of the United States Court of Appeals for the 9th Circuit confesses personal ignorance of the existence and nature of such a fund in a district court of his circuit?

3. Whether the failure of an attorney to return a telephone call to a clerk employed by a United States District Judge can ever be an act of contempt of a United States District Court where the attorney does not know of the existence of the original telephone call, and where no possible intent to obstruct the administration of justice therefore exists, within the meaning of that wrongful intent requirement set forth in such leading federal decisions as United States v. Seale, 461 F. 2d 345 (7th Cir. 1972) and In Re Dellinger, 461 F. 2d 389 (7th Cir. 1972)?

4. Whether the four-fold requirements necesary to establish direct criminal

contempt of Court adopted by the 7th Circuit in United States v. Seale, 461 F. 2d 345 (7th Cir. 1972) and In Re Dellinger, 461 F. 2d 389 (7th Cir. 1972), and by the District of Columbia Circuit in United States v. Meyer, 462 F. 2d 827 (D.C. Cir. 1972) and United States v. Meyer, 346 F. Supp. 973 (D.C. D.C. 1972), shall now be adopted as the governing criteria for all federal Courts in the United States, requiring the establishment of:

(a) misbehavior (2) so near to or in the presence of the Court (3) that actually obstructs the administration of justice, being done with (4) the wrongful intent to so do.

5. Whether the foregoing four elements must be established as a matter of Federal Due Process of Law, or alternately, under promulgation of this Honorable Court in its supervisory role over the Lower Federal Court System.

6. Whether the failure of an attorney to return a telephone call to a clerk employed by a United States District

Judge can ever be an act of direct criminal contempt of Court occurring within the usual or audible range of the judge, so as to allow summary contempt procedures to be employed under Rule 42 (A), F. R. Crim. P.?

7. Whether any alleged federal criminal contempt may be summarily punished under Rule 42 (A) F. R. Crim. P. if the United States District Judge wilfully refuses to certify that he saw or heard the conduct constituting the contempt, and fails to prepare, execute, and file in the record the order of contempt required by Rule 42 (A), F. R. Crim. P.?

8. Whether an appeal from a conviction of an alleged act of criminal contempt committed by an attorney is ever moot merely because that attorney makes a forced "contribution" to a mystical local "fund" to avoid going to jail, where there are known and unknown potential consequences and ramifications of that conviction on the attorney's future?

9. Whether a hearing and grant of Certiorari must here occur because of the conflict in the United States Circuit

Courts of Appeal on whether an attorney's conviction of contempt is Moot Vel Non because the "contribution" was made?

10. Whether the mandates of Argersinger v. Hamlin (1972), 407 U.S. 25, providing for the required furnishing of counsel for any misdemeanor where there can be an incarceration must be applied to alleged direct criminal contempts in the Federal District Courts, where the alternate offered to incarceration is the illegal coercion of making a "contribution" to a mythical, ethereal "attorneys' fund?"

11. Whether, since the act of failing to return a telephone call to a Court clerk is not direct criminal contempt, if contempt at all, the mandates of Rule 42 (B), F. R. Crim. P., must be applied, with the full hearing upon notice mandated by Taylor v. Hayes, 418 U.S. 488 (1974) being accorded?

12. Whether any federal appeal from an alleged direct criminal federal contempt is moot if the record shows:

    (a) the act asserted to be contemptuous did not occur any where within

the visual or audible range of the District Judge;

(b) the attorney contemnor was not aware that he had received a telephone call within the immediate preceding hour from a Court clerk, and hence could not possibly entertain any wrongful intent failing to return the telephone call;

(c) The District Judge erroneously attempted to invoke Rule 42 (A) F. R. Crim. P. summary direct criminal contempt procedures when Rule 42 (B) procedures are mandated.

(d) The District Judge wilfully refused to prepare, execute, and file the requisite order of contempt provided for in Rule 42 (A), F. R. Crim. P.;

(e) The District Judge imposed

a sanction not provided for under 18 U.S.C. 401 (1), i.e. either a fine or imprisonment, by coercing the attorney to contribute $50.00 to a "fund" unknown to exist by even the Chief Judge of the United States 9th Circuit, concomitantly threatening the attorney with disbarment, and jail, calling the attorney a "bum" in open Court, and threatening the attorney with "helping him to get out of the practice of law" unless the attorney would "knuckle under and do it right,"

where the decisions of the United States Court of Appeals for the 5th Circuit in United States v. Schrimsher, In Re Butts, Attorney at Law, 493 F. 2d 842 (5th Cir. 1974) and United States v. Camil, 497 F. 2d 225 (5th Cir. 1974) hold that such an appeal by an attorney from a

conviction of direct criminal federal contempt is not mooted by completion of the sanction imposed?

13. Whether the emotionally unstable Court, who in this case "lost his temper," should have recused himself from adjudicating an indirect contempt where a couple hours elapsed between occurrence of the alleged indirect contempt and the adjudication thereof, within the meaning of Mayberry v. Pennsylvania (1971), 400 U.S. 455, Codispoti v. Pennsylvania, (1974) _____ U.S. _____, and Taylor v. Hayes, 418 U.S. 488 (1974)?

14. Whether the failure of the United States District Judge to provide a hearing to enable the convicted attorney contemnor to confront the Court clerk who allegedly made the telephone call deprived the attorney of his Sixth Amendment rights to confront and cross-examine the key witness allegedly testifying against him?

15. Whether the Sixth Amendment to the United States Constitution requires that the attorney contemnor have a hearing whereby he may have compulsory

process to obtain his own secretary to testify concerning the alleged telephone call made by employees of the District Judge?

16. Whether the Sixth Amendment requires that, in this act of indirect contempt, if contempt at all, the defendant attorney be allowed to defend with counsel of choice upon due notice of the charges and the nature and cause of the accusations being made against him by the District Judge, within the meaning of Argersinger v. Hamlin, 407 U.S. 25 (1972), and Taylor v. Hayes, 418 U.S. 488 (1974)?

UNITED STATES CONSTITUTION AMENDMENTS INVOLVED

Sixth Amendment -

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

FEDERAL RULES CRIMINAL PROCEDURE

Rule 42 (A) -

"A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

Rule 42 (B) -

"A criminal contempt except as provided in subdivision (A) of this rule shall be prosecuted on notice. The notice shall state the

time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

UNITED STATES STATUTES

18 U.S.C. 401 (1) -

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -

(1) Misbehavior of any person in its

presence or so near thereto as to obstruct the administration of justice; . . ."

STATEMENT OF THE FACTS

This petition for Writ of Certiorari seeks review of a direct criminal federal contempt conviction and illegal sanction imposed on Attorney Roger S. Hanson of Los Angeles, California. The record is sparse for two significant reasons, both the fault of the United States District Judge:

1. The District Court found "direct contempt" in the act of failure of the attorney petitioner contemnor to return a telephone call to a Court clerk made in the immediate preceding hour by that Court clerk to the attorney's office, and illegally, and erroneously held no hearing whatsoever, under Rule 42 (B), F. R. Crim. P. handling the entire matter without allocution in 16 lines of the transcript (See lines 3 - 18, page 3, March 8, 1973 transcript).
2. The Court wilfully refused to prepare, sign, and file of record the required contempt order under Rule 42 (A), F. R. Crim. P. and hence the Court

thus disenabled enlightened review of the conviction. That certificate, properly filled out, would set forth in a factual manner the acts which must have occurred within the visual and audible range of the Court in order to handle the matter by Rule 42 (A), F. R. Crim. P. It is clear from the facts of this case that the District Judge could not have ever honestly executed said certificate because no act occurred in his visual or audible presence to qualify for Rule 42 (A) treatment.

Further, the actual facts which occurred in the case were omitted by the opinion of the U. S. Court of Appeals for the 9th Circuit, said opinion failing to reveal the illegally used Rule 42 (A) procedures, the failure to prepare, execute, and file the required Rule 42 (A) order, and cursorily mentions the illegally coerced "contribution." Further, the opinion fails to reveal the total absence of a recognized act of contempt, nor does it reveal the failure to establish any one of the four contempt criteria of United States v. Seale, 461 F. 2d 345 (7th Cir. 1972).

Hence, the next following narration will attempt to substitute for that denied hearing - denied Rule 42 (A) certificate, in order to provide this Honorable Court with the necessary background to couple with the nine-page transcript of March 6, 1973 and the 24-page transcript of March 8, 1973.

These two transcripts, constituting the entire record below, are herewith lodged with this Honorable Court.

The opinion of the 9th Circuit affirming the illegal conviction and illegal sanction, is herewith attached.

Petitioner Roger S. Hanson is a member of the Bar of the United States Supreme Court, the Supreme Courts of California, Illinois, Michigan, and Iowa, and of all of the Circuit and District Courts concerned with the States of California and Iowa.

He represented an indigent petitioner for 28 U.S.C. 2254 relief, one Jess Cancino, before the United States Court of Appeals for the 9th Circuit, winning a reversal of a summary denial of Writ of Habeas Corpus by United States District Judge A. A. Hauk. Cancino v. Craven, 467 F. 2d 1243 (9th Cir. 1972).

An evidentiary hearing was ordered

and it was set for early February, 1973. One Alan Novodor, Esq., Deputy Attorney General, representing the State of California in the Cancino matter, was otherwise occupied on the early February date, and asked for and graciously received a stipulated continuance to Tuesday, March 6, 1973.

On Monday, March 5, 1973, client Jess Cancino took seriously ill with the flu. Petitioner attorney Roger S. Hanson courteously telephoned both the attorney general, Alan Novodor, and the clerk of the District Judge, one Guerro, and advised them that because of Cancino's severe illness, a motion for a continuance would be made on Tuesday, March 6, 1973. The Clerk Guerro made no mention of the District Judge desiring a "medical excuse" signed by a physician during the Monday, March 5, 1973 conversation. On Tuesday, March 6, 1973, torrential rains struck Los Angeles. Petitioner attorney Hanson left the freeway to call the clerk of the District Judge to advise that Hanson would be late. (Los Angeles freeway traffic moves about five miles per hour in heavy rain as the local citizens do not know how to drive in the rain.)

That the District Judge was aware of the

unavoidable delay is made manifest by the official record:

(March 6, 1973, Page 2)

"THE COURT: Well, we will hold the matter for the moment.

I understand this Hanson is on his way trying to get here, according to some secretary . . . ."

A few lines later, the District Judge issued a bench warrant for the arrest of petitioner attorney Hanson, fixing a bond at $100,000.00 (Page 5, March 6, 1973 transcript), even though he was aware that Hanson was trying to appear but could not because of the weather and traffic conditions. This was explained to the Court (Line 25, Page 7 through Line 1, Page 8).

Because of Cancino's illness, the evidentiary hearing was continued to Friday, March 9, 1973

On Thursday, March 8, 1973, desiring to extend every advance warning possible to the District Judge, petitioner attorney Hanson telephoned Cancino, learning that Cancino was still severly ill. At 9:00 A.M., petitioner attorney Hanson made an appearance in State Court and then immediately thereafter personally visited the Chambers of the respondent

District Judge to advise him informally that on the scheduled Court appearance set for the next day, March 9, that a continuance would be necessary and that Cancino was then seeking the desired certificate from a physician. Contrary to the opinion which states, "But Hanson was slow in producing a doctor's certificate" (Page 2), Hanson personally undertook to visit the Judge to only informally advise of the impending continuance. The doctor's certificate was timely sought at the most practical time it could be sought, i.e., the most proximate time before the formal continuance of March 9, 1973 would be asked for, and at a time that Cancino's condition could be ascertained.

On the informal appearance on Thursday, March 8, 1973, the object of which was merely to advise the Court of the still-prevailing illness of Cancino and that the certificate would be presented the next day at the next formally scheduled appearance, "the unhappy confrontation with the Court happened," as termed at Page 2, opinion. It is true that the District Judge lost his temper; it is absolutely false that petitioner Hanson "is not too exacting of himself," for he did all he could one full day before the next formal

Court appearance to facilitate, rather than obstruct the administration of justice in the Federal Judicial System. The District Judge personally called Hanson into the Courtroom and the personal diatribe, insults, and slanderous remarks set forth at pages 3 - 8 of the March 8, 1973 transcript occurred.

The Court summarized his verbal attack in the following narrative from page 8:

> "THE COURT: And you had better get with it about these delay tactics, about not answering your phone calls. Every time I run into a bum like this, like you -- I get the same talk from the other judges, and I am just not going to stand for it. You are going to knuckle under and do it right like a lawyer should do or get out of the business.
>
> MR. HANSON: Well, I don't know --
>
> THE COURT: And I will help you get out if you want to keep insisting on it.
>
> I told you what you are up for, for contempt of this Court. Now, you are going to spend one

night in jail, and that is the order of the Court, you report to the Marshal at 4:45 or you bring in $50.00 as a contribution to the attorneys' fund by 4:45, and that you have a doctor's certificate for your man.

Assuming you have a doctor's certificate I am going to run this case tomorrow and you get a continuance; assuming you don't have it, you don't get a continuance, and we are going to go tomorrow. All right. That is it."

The Court had held the petitioner attorney in direct criminal contempt of Court for failure to return a telephone call to a law clerk. None of the assailed act occurred in the visual or hearing range of the Court.

The attorney was required to "contribute" $50.00 to a local "fund" or go to jail.

This sanction was purportedly assessed for "contempt."

Later, the afternoon of the same day, at the demanded appearance for delivery of the physician's certificate, the Court made it clear that his "fund" would "enjoy your $50.00" (Page 23, lines 18 - 22), and he

emphasized that "The $50.00 is a contribution" (Page 24, lines 15 - 17).

If the attorney did not like it, "the Court of Appeals is always open."

The District Judge was as wrong about the openness of the Court of Appeals as he was about every other matter connected with the case, for, on February 6, 1975, in its opinion, the Court of Appeals declined to do anything about the serious deprivations of constitutional due process, illegal use of Rule 42 (A), F. R. Crim. P., and illegal imposition of a coerced "contribution" to the Judge's "fund" even though the Chief 9th Circuit Judge confessed full ignorance of the existence of that fund and admitted that the United States had failed to obtain the money as a "fine."

The rationale was the case was moot because the coerced contribution had already been extracted.

Yet, the issues remain viable and the petitioner attorney still remains under conviction of contempt. Other learned Circuit Courts have ruled that an appeal from a contempt conviction is not mooted even though a fine is paid or a sentence served, for either attorneys or potential attorneys

or law students. United States v. Camil, 497 F. 2d 225, 226 - 227 (5th Cir. 1974); United States v. Schrimsher. In Re Butts, Attorney at Law, 493 F. 2d 842 (5th Cir. 1974); Sibron v. New York (1968), 392 U.S. 40, 57.

The United States 9th Circuit cites no cases in support of its ruling, and ignores the conflicting authority from the other circuits.

While the $50.00 "enjoyed" by the Judge's fund is small, the issues here presented are grave, and go to issues under the supervisory power of this Honorable Court over the lower Federal Courts, denial of due process of law and illegal use of the Federal contempt power to coerce illegal monetary contributions to local funds, diverting the money from the United States Government.

A further severe constitutional issue is the personal abuse handed out to the attorney by a representative of the Federal Judicial System, and the accompanying adjudication of contempt by that Judge, with failure to recuse himself.

This Court has said before:

> "But that there may be no misunderstanding, we make clear that this Court, if its aid be needed,

will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of advocate on behalf of any person whatsoever. . ." Sacher v. United States, 343 U.S.1, 13 - 14.

We suggest that the instant case, in spite of "let it be known that it did not amount to much" (Page 3, opinion) really contains such a seriatim of violations of the Federal Contempt Power as to boggle the imagination.

Thus, this petition for Writ of Certiorari to the United States Court of Appeals for the 9th Circuit seeks review of a direct criminal attorney contempt conviction that, in the words of the Chief Judge of the United States Court of Appeals for the 9th Circuit "did not amount to much;" nonetheless, the procedures used and sanctions imposed violated every precept and principle of 18 U.S.C. 401 (1) and Rules 42 (A) and 42 (B), F. R. Crim. P., violated due process of law by imposing summary sanction without noticed hearing for an act clearly not occuring in the audible or visual range of the judge, and presents a case of first impression, as

far as is known to counsel, in use of the narrow federal direct criminal contempt power by a United States District Judge pursuant to 18 U.S.C. 401 (1), and Rules 42 (A) and 42 (B), F. R. Crim. P., to coerce monetary payments to a local unknown "fund," instead of, and other than, the United States Government, who is normally the recipient of the fine legally allowed to be imposed as a sanction for contempt of Court in the federal district Courts. It presents a rather shocking display of the federal contempt power to threaten a courteous attorney with removal from the legal profession, accompanied with slanderous in-Court name-calling of that attorney by the United States District Judge, unless that attorney would "knuckle under" to the commands of the Judge. Unless the "contribution" to the Court's "fund" was made within a few hours, the attorney was to be incarcerated.

That act asserted to be "contemptuous" consisted of the alleged failure of the attorney to "return a telephone call" made by a Court clerk to that attorney's office within the immediately preceeding hour, where the attorney did not know of the existence of the phone call, and could thus

entertain no wrongful intent to obstruct the administration of justice. United States v. Seale, 461 F. 2d 345 (7th Cir. 1972); In Re Dellinger, 461 F. 2d 389 (7th Cir. 1972). The act of failing to return a telephone call to a Court clerk, if contemptuous at all, is an act of indirect criminal contempt for which the safeguards provided for in Rule 42 (B) of F. R. Crim. P. must be accorded; unless the act assailed occurred directly in the presence of the Court and the Court took immediate action to preserve order, a delayed adjudication requires Rule 42 (B) proceedings. In Re Oliver, 333 U.S. 257, 275 - 276; Johnson v. Mississippi, 403 U.S. 212; Taylor v. Hayes, 418 U.S. 488 (1974). Such rights of the attorney were not here accorded.

Even though the act here alleged to constitute contempt occurred early in the morning of Thursday, March 8, 1973, the District Judge did not attempt to adjudicate it until 11:55 A.M. by calling the attorney into the Courtroom, whereupon the following colloquy occurred:

"THE COURT: Let the record show we are bringing up the case of Cancino versus the United States on the question of the

hearing ordered by the Circuit Court on this writ of habeas corpus.

Now, Mr. Hanson, what is wrong? I have got to make some decisions to handle my calendar. You understand that?

MR. HANSON: I understand that, your Honor.

THE COURT: That is why we tried to reach you. We can never reach you. We call your answering service and they don't know where you are. That is the wrong way to treat a Court.

MR. HANSON: When were you trying to call me?

THE COURT: All morning. That will be $50.00 into the library fund or one night in jail. Now, do you hear me?

THE HANSON: Well, I didn't know --

THE COURT: Did you hear me?

MR. HANSON: I hear you, but --

THE COURT: All right. Now, you are going to pay that by 5:00 o'clock this afternoon or spend one night in jail, or pay $50.00

to the library fund, the so-called attorneys' fund. Do you hear me? That is the order of the Court. You do what you want about that.

Now, let's go on to the problem for tomorrow."

It is to be noted that no notice of the charges occurred, no opportunity to present a defense occurred, and no opportunity for even allocution occurred contrary to the due process requirements of Groppi v. Leslie, 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972). Rule 42 (A) mandates that an order of contempt shall be prepared reciting the facts, be signed by the Judge, and entered of record in order to invoke summary proceedings and disposition. Such an order was wilfully refused to be prepared by the District Judge, and to this day, two years later, has never been prepared. Other United States Circuit Courts hold this failure fatal to the conviction. United States v. Anthony Frederick Vano, et al. . . In Re: Herbert Shafer, etc., 496 F. 2d 1195 (5th Cir. 1974); United States v. Schrimsher. In Re Butts, Attorney at Law, 493 F. 2d 842 (5th Cir. 1974); United States v. Camil, 497 F. 2d 225 (5th Cir. 1974); Widger v. United States, 244 F. 2d 103, 106 -

107 (5th Cir. 1957); Pietsch v. President of the United States, 434 F. 2d 861, 863 - 864 (2d Cir. 1970) per Associate Justice Tom Clark (retired) sitting by designation; United States v. Galante, 298 F. 2d 72, 75 n.1 (2d Cir. 1962). In the 9th Circuit, this failure to prepare the Rule 42 (A) Certificate apparently is of no concern, and the attorney's conviction is nonetheless affirmed without citation of case authority.

In the instant case, the Chief Judge of the United States 9th Circuit Court of Appeals judicially confesses ignorance of the existence of the "fund" allegedly maintained by the local District Judge; he asks, inter alia:

"What sort of an entity is the attorney's fund?"

"Doesn't it have trustees?"

"Should the trustees be parties (to this appeal)?"

"Can we order parties (the trustees) not before the Court to pay back the $50.00 when they do not know they are in Court?"

"And, if it is a fine, shouldn't the Government be entitled to the money rather than

having it diverted?"

(Page 3, Opinion, herewith attached.)

Since the Chief Judge does not know of the "fund's" nature and viability, and the Government is seemingly being cheated of the fruits of the $50.00, it is hoped that the Supervisory Power of this Honorable Court, via a Grant of Certiorari, can properly inquire into and recover the funds for the use of the United States Government and more properly insure compliance with the only allowable contempt sanction under Rule 42 (A), F. R. Crim. P., and 18 U.S.C. 401 (1), either a monetary <u>fine</u> or custodial incarceration.

We suggest certiorari should be granted to:

1. resolve conflicts in the Circuits whether the summary federal contempt power may be used, and a sanction imposed absent the execution, and filing, of the Rule 42 (A) contempt order; (2nd and 5th says no, 9th says yes.)
2. resolve conflicts in the Circuits whether an attorney's conviction of contempt is <u>moot vel non</u> by payment of

a coerced "contribution" or service of a custodial sentence in view of future potential consequences to him;
(5th Circuit says no mootness, 9th says yes.)

3. resolve whether due process of law is denied by use of summary 42 (A) proceedings where the record indicates indirect contempt 42 (B) proceedings must be used;
4. Resolve the legality of a Federal Judge's maintaining a local fund that money gleaned from contempt fines normally going to the U.S. Treasury is diverted to, said fund being unknown to the governing Circuit Court;
5. resolve whether the District Judge should have recused himself because of his preconceived bias and hatred for the attorney, his slanderous remarks, indicating that he wished to aid in the

attorney leaving the practice of law, all within the meaning of Mayberry v. Pennsylvania, 400 U.S. 455 (1971), Codispoti v. Pennsylvania (1974), _____ U.S. _____, and Taylor v. Hayes, 418 U.S. 488 (1974);

6. resolve whether Taylor v. Hayes, 418 U.S. 488, and Argersinger v. Hamlin, 407 U.S. 24 require that counsel be offered to any potential contemnor where any potential jail sentence may be carried out;

7. resolve whether throughout the Federal Judicial system it shall be required, in order to hold anyone in direct criminal contempt of a Federal Court, to establish beyond a reasonable doubt that there occurred (1) misbehavior (2) which occurred in the presence of or so near to a court (3) which actually obstructed the administration of justice and (4) which was

done with a wrongful intent, as established in United States v. Seale, 461 F. 2d 345 (7th Cir. 1972) and In Re Dellinger, 461 F. 2d 389 (7th Cir. 1972), by the 7th Circuit, and in United States v. Meyer, 462 F. 2d 827 (D.C. Cir. 1972) and upon remand in United States v. Meyer. In Re Hirschkop, Attorney, 346 F. Supp. 973 (D.C. D.C. 1972) in the District of Columbia Circuit.

REASONS FOR GRANTING WRIT OF CERTIORARI

ARGUMENT

I

UNDER THE FEDERAL DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT, IT IS NEVER MOOT FOR AN ATTORNEY OR LAW STUDENT TO APPEAL A CONVICTION OF FEDERAL CRIMINAL CONTEMPT OF COURT, IN SPITE OF HAVING COMPLETED THE SANCTION, BECAUSE OF THE POTENTIAL THAT SAID CONVICTION COULD HAVE ON HIS FUTURE; BECAUSE OF THE INSTANT RULING OF "MOOTNESS" THERE IS AN IRRECONCILABLE CONFLICT IN THE CIRCUIT COURTS ON A SERIOUS THRESHOLD ISSUE, AND CERTIORARI SHOULD BE GRANTED.

At the inception of this case is the threshold problem whether an attorney gives up his right to have an illegal federal contempt conviction reviewed on appeal merely because he succumbs to paying an illegally extracted monetary contribution to a fund that diverts normal contempt fines away from the United States Treasury, and where, in addition, not one of the many safeguards provided in Rules 42 (A) and 42(B), F. R. Crim. P. have been complied with. 18 U.S.C. 401 (1).

In the United States Court of Appeals

for the Ninth Circuit, petitioner attorney Hanson was deemed to have "stumbled" by failing to seek a "stay" in the illegal extraction of a contribution by the Federal Judge to a local "fund" of uncertain origin or administration (Pages 2 - 3 , Opinion, Cancino v. Craven, here attached). No support for this rationale is cited.

Strangely enough, the 9th Circuit implies that possibly the matter would not be moot if a day in jail had been served. Thus, as we read the opinion, the service of a legal day in jail would permit review even though a successful review could never return the day lost in jail; the coerced payment of an illegally extracted monetary contribution to the District Judge's "fund" seems to preclude review although the money could be returned if the Court only knew where it was located. Normally federal fines fall into the hands of the United States Treasury; in the instant case, two Judges of the United States Court of Appeals and a District Judge from Oregon confess ignorance of the whereabouts of the "contribution" and query whether the appellant need join the "trustees" (if they exist) to the Notice of Appeal.

Irrespective of whether a day in jail

already served but irretrievably lost supports an appeal, but a monetary extraction once paid and capable of being returned does not, it follows that a federal criminal conviction stands, and a review of the constitutionality of that conviction is here sought, which is quite independent of what sanction is imposed. The criminal conviction of contempt remains on the record of an attorney, and the attorney wants it removed and nullified by review on direct appeal. In the 5th Circuit, he can do so; in the 9th Circuit, he can not. The clear conflict in the circuits mandates that Certiorari be granted to settle whether the right to appeal an illegal federal criminal contempt conviction suffered by an attorney is lost by the payment of an illegally extracted monetary sum into a local "fund" other than the United States Treasury.

The following matrix points up the comparison and conflict in the Circuits:

Case / Issue	United States v. Schrimsher. In Re Butts, Attorney at Law, 493 F. 2d 842 (5th Cir. 1974)	United States v. Camil, 497 F. 2d 225(5th Cir. 1974)	Cancino v. Craven, In Re Hanson, ___ F. 2d ___, (9th Cir. 1975)
Party held in contempt	A practicing attorney.	Law student or potential attorney.	A practicing attorney.
Type of contempt	Alleged courtroom disruption correctly calling for Rule 42 (A) proceedings.	Actual courtroom disruption, mixed 42 (A) - 42 (B).	Indirect matter, not contempt at all, where 42 (A) erroneously used.
Act asserted to be contemptuous	Refusal by attorney to mark a photograph as an exhibit in a trial with argument by attorney	Actual courtroom disruption by the defendants, questionable Rule 42 (A) matter since	Clearly erroneous use of 42 (A) proceedings to punish act which occurred out of court and which

	when he finally complied. Rule 42 (A) matter if contempt at all.	Judge had to inquire as to identity of noisemaker.	was not disruptive - failure to return a phone call made to a clerk.
Sentence Imposed	Confinement in jail over noon-hour recess.	Summary probation to end of trial.	Illegal extraction of money to be paid into a local library fund maintained by District Judge.
Mootness Vel Non?	Definitely not moot because attorney might be affected by the conviction Sibron v. New York (1968) 392 U.S. 40, 57.	Definitely not moot because one contemnor was a law student who could suffer potential consequences for bar admission; Sibron v. New York (1968) 392 U.S. 40, 57.	Held Moot without citation of any authority although Sibron v. New York 392 U.S. 40, 57 and 5th Circuit authority was cited to 9th Circuit.

The problem for the attorney held in contempt is cogently stated by Circuit Judge Rives of the U. S. 5th Circuit in United States v. Schrimsher. In Re: Butts, Attorney At Law, 493 F. 2d 842 (5th Cir. 1974), cited with continued approval in United States v. Camil, 497 F. 2d 225, 227, explaining the commands of Sibron v. New York, (1968) 392 U.S. 40, 57 in attorney contempt reviews:

> "Another qualification to the St. Pierre doctrine of mootness lends additional support to our rejection of the government's mootness argument. In Sibron, the Court stated that St. Pierre 'must be read in light of later cases to mean that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.' 392 U.S. at 57 [88 S.Ct. 1889]. Butts' conviction for contempt presumably could be used for impeachment and sentencing purposes in any future criminal proceeding. This conviction would be especially damaging

> if Butts were ever again accused of being in contempt of court. Conviction for contempt of court could also have serious adverse career consequences for Butts. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage Butts' reputation in the legal community, and this in turn might affect his ability to attract clients and to represent them effectively, especially in open court. In light of these possible collateral consequences, Butts' appeal is not 'abstract, feigned, or hypothetical' so as to justify dismissal for mootness. See Sibron, supra, 392 U.S. at 57 [88 S.Ct. 1889]." (Footnotes omitted.)

The United States 9th Circuit in its opinion denying review on the merits of this illegal direct criminal contempt of an

attorney neither cites authority nor distinguishes the clear commands of the Sibron v. New York case, 392 U.S. 40, 57.

We suggest that any attorney who wishes review on the merits of an illegal conviction of federal criminal contempt that he has suffered need not be denied and should not be denied this review because of "mootness." The clear conflict shown above should cause the grant of certiorari.

We suggest it is difficult to distinguish between the "minor contretemps" (Page 1, opinion) characterizing the illegal Rule 42 (A) procedure in the case at bar and the quick, terse "argument" of the attorney in U.S. v. Schrimsher, 493 F. 2d 842 (5th Cir. 1974) as to "future consequences" on the professional life of the attorney involved, and certiorari should be granted.

II

UNDER THE FEDERAL DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE 5th AND 2nd CIRCUITS, A FEDERAL CRIMINAL DIRECT CONTEMPT OF COURT CONVICTION CAN NEVER BE SUSTAINED IF THE UNITED STATES DISTRICT JUDGE REFUSES AND FAILS TO PREPARE, EXECUTE, AND FILE OF RECORD THE ORDER OF CONTEMPT REQUIRED UNDER RULE 42 (A) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE; UNDER THE INSTANT DECISION OF THE 9th CIRCUIT FOR WHICH REVIEW IS NOW BEING SOUGHT, THE FOREGOING FAILURE IS IMMATERIAL, THUS CREATING AN IRRECONCILABLE CONFLICT IN THE CIRCUITS. BECAUSE OF THIS CONFLICT, THIS HONORABLE COURT SHOULD GRANT CERTIORARI IN ITS SUPERVISORY ROLE OVER THE LOWER FEDERAL COURTS.

The instant U.S. 9th Circuit decision affirming an illegal direct criminal contempt conviction is the only decision known that affirms the conviction even though the mandate of Rule 42 (A), F. R. Crim. P. have been violated, the Federal Judge here refusing to prepare, execute, and file the mandatory order of contempt.

The instant decision overtly fails to even discuss this fundamental error.

In fact, it would have been impossible for the District Judge to execute the Rule

42 (A) contempt certificate, for none of the acts which were here illegally held to be contemptuous occurred within the visual or audible range of the District Judge.

The following comparison matrix points up the conflicts in the Federal Circuits:

Case & Circuit Issue	2nd Cir. Pietsch v. Pres. of United States 434 F.2d 861 (2d Cir. 1970)	5th Cir. U.S. v. Vano, 496 F.2d 1195; U.S. v. Schrimsher, 493 F.2d 842; U.S. v. Camil, 497 F.2d 225	9th Cir. Cancino v. Craven. In Re Hanson, ____ F.2d ____ (9th Cir. 1975)
Was the act direct contempt?	Yes; Pietsch committed disruption in the courtroom.	Yes; in each case, direct contempt was involved.	No; the act occurred outside of court, but the District Judge erroneously used direct contempt proceedings.
Was a Rule 42 (A) certificate filed?	Yes, but was not factual, only conclusionary.	No; in the cases above cited, the convictions were either reversed, or remanded for furnish of the certificate; in no case was the conviction affirmed.	No, the certificate was never prepared, executed, or filed at any time whatsoever, but the conviction was nonetheless affirmed; no hearing was ever accorded.

The Honorable Tom Clark, sitting by designation as a 2d Circuit Judge in Pietsch v. President, 434 F. 2d 861 (2d Cir. 1970), said:

> "The Order and Judgment in Contempt finds that Pietsch behaved in an 'unruly, loud, boisterous manner disrupting the proceedings of this Court and the administration of justice.' The Court further found that upon being instructed to leave the courtroom Pietsch 'did refuse, physically resisting the efforts of the United States Marshal to escort him out of the courtroom and then having addressed this Court in a contemptuous and boisterous manner; all the foregoing occurring in the sight and sound of the court.* * *'

[4] Rule 42 (a) of the Federal Rules of Criminal Procedure provides that where the contempt is committed in the actual presence of the Court and the Judge certifies that he saw or heard the conduct constituting the contempt, the offense may be punished summarily. It further

requires that the order of contempt recite the facts and be cited by the Judge and entered of record. It will be noted that the Order here does not recite the facts which lead to the finding and sentence of contempt but merely states that Pietsch 'behaved in an unruly, loud, contemptuous and boisterous manner interrupting the proceedings.' The facts as to how the proceedings were disturbed were not recited. Upon returning to the transcript of the occurrence, we find no reference to the nature of the disturbance which led the Judge to initially inquire: 'Who is that man?' We note that after Pietsch replied: 'I am here for a hearing today,' the Judge ordered the Marshal to 'take that man outside.' If he refuses, take him into the cell.' This Order was not countermanded and the Marshal was directed to 'bring that man forward.' After Pietsch arrived at the Bench, the Judge inquired as to his name and upon being informed that he was

plaintiff in an action, the Judge immediately said: 'You are disturbing the Court. Ten days in prison.' The remainder of the colloquy between the Judge and Pietsch, including the blasphemy the latter uttered, came after the sentence. Apparently the words of the Order concerning the terms 'unruly, loud, contemptuous and boisterous' action must have referred to the events occurring after the sentence, since the transcript reflected no such situation prior thereto. Likewise the finding that Pietsch 'upon being instructed to leave the courtroom * * * ' appeared to have happened after the sentence was pronounced. This Court said in United States v. Galante, 298 F.2d 72, 75 n.1 (1962):

> 'While a certificate in support of a summary contempt conviction need not and probably should not set out all the relevant

> incidents verbatim from the record, it should summarize them, with appropriate references to the record, in such a way as to make clear their nature and contumacious tendency.'

The certificate here being far too defective, we are obliged to reverse the conviction.

This is not to say that we excuse the conduct as reflected by the entire record nor that we take issue with the exercise of power to summarily punish a contempt in the narrowly limited field authorized by Rule 42 (a) but only that the procedural safeguards that the Rule provides must be strictly adhered to lest the drastic power authorized escape the permissible limits of reason and fairness. The risk to impartial justice is too great to do otherwise. In the development of our liberties, strict adherence to procedural regularity has been a most potent factor. Burdeau v. McDowell, 256 U.S. 465, 477, 41 S.Ct. 574, 65

L. Ed. 1048 (1921). Moreover as was said in United States v. Galante, supra, 298 F.2d at 75:

> 'The power to punish for contempt committed in the presence of the court is an unusual and summary sanction, arising from the necessity of control of judicial proceedings and their protection from disruption and delay, whether by litigants or others. Because of the possibility of its arbitrary use, and the absence of the usual safeguards of a criminal trial, the power must be sparingly and carefully used 'with the utmost sense of responsibility and circumspection.' Brown v. United States, 359 U.S. 41, 52, 79 S.Ct. 539, 547, 3 L.Ed. 2d 609. * * *'

This teaching has been repeated throughout our history beginning as early as Chief Justice Marshall's

days where the limits upon the exercise of power were said to be 'the least possible power adequate to the end proposed.' Anderson v. Dunn, 6 Wheat. 204, 232, 5 L. Ed. 242 (1821). And in order to minimize the abuse of power of summary punishment, its use has been 'always, and rightly * * * regarded with disfavor.' Sacher v. United States, 343 U.S. 1, 8, 72 S.Ct 451, 454, 96 L.Ed 717 (1952). The rectitude of judicial proceedings can only be assured through out continued support and devotion to these principles.

The Judgment holding Pietsch in contempt is reversed."

The Fifth Circuit speaking in United States v. Camil, 497 F.2d 225 (5th Cir. 1974), citing with approval Widger v. United States, 244 F.2d 103, 106 - 107 (5th Cir. 1957) said:

> "By its terms, a criminal contempt may 'be punished summarily' only 'if the judge certifies' that he witnessed the alleged contemptuous conduct and that it was committed in his actual presence. The rule further provides that

the order must 'recite the facts.' This record contains no certificate at all by the judge and the order does not recite any fact but merely the conclusions of the Court.

This rule providing for punishment of contempts summarily must be given a 'narrow construction' providing, as it does, for punishment without affording the accused 'the normal safeguards surrounding criminal prosecutions'; it being plain from the history of contempt procedures that the courts and congress have demonstrated a definite 'plan to limit the contempt power to "the least possible power adequate to the end proposed"'. It is, therefore, essential that courts proceeding summarily 'must be meticulously careful to observe * * * safeguards.' While it appears from the record as a whole that the contemptuous conduct was in the presence of the Court, no certificate was signed by the Judge as required by the rule, and the remain-

ing portions of the record can be considered only as assisting the Court in construing the terms of the certificate."

It would appear that the 9th Circuit places the onus of the Judge's failure to execute, prepare and file the certificate on the shoulders of the "contemnor" attorney, stating that the attorney "would be right back up against jurisdiction" if he could "get by mootness." (Page 3, Opinion). How the 9th Circuit expects the contemnor attorney to force the District Judge to either prepare, execute and file the certificate or prepare a "final order" and force an "entry" of it escapes explanation. It is of course clear that Rule 42 (A) has been patently violated, and that the other circuits under these circumstances cause automatic reversal or remand for preparation of the required certificate, but the local 9th Circuit <u>ignores</u> this Federal Rule in spite of the plain record showing that <u>no act</u> here occurred in the visual or audible presence of the judge. We question the sanction of this blatant and wilful violation of the Federal Rules by the 9th Circuit in view of the fully opposite ruling by all circuits who have met the problem. Under its

supervisory obligation to resolve conflicts in the Circuits, we ask that certiorari issue to the U. S. 9th Circuit in the instant case, where not only were Rule 42 (A) proceedings inappropriate, but the erroneous use thereof was wilfully failed to be commemorated by the required Rule 42 (A) certificate.

We ask that this illegally obtained attorney contempt conviction be reversed; to do less insults the intelligence.

III

THE FOUR REQUISITES FOR A CONVICTION OF DIRECT CRIMINAL CONTEMPT OF COURT IN THE FEDERAL SYSTEM WERE NOT HERE ESTABLISHED, WITHIN THE MEANING OF UNITED STATES v. SEALE, 461 F. 2d 345 (7th Cir. 1972) AND IN RE DELLINGER, 461 F. 2d 389, 397 (7th Cir. 1972).

In the oft-quoted Chicago-7 litigation, United States v. Seale, 461 F. 2d 345 (7th Cir. 1972) and In Re Dellinger, 461 F. 2d 389 (7th Cir. 1972), federal summary direct criminal contempt law was deemed to require a four-fold establishment in order to inflict the sanction: (1) misbehavior (2) in the presence of the Court (3) which actually obstructs the administration of justice and (4) which was done with the wrongful intent to so do.

We assert that none of the foregoing elements are demonstrated by the record herein, and this conviction must be reversed.

Clearly, the failure to return the telephone call did not occur in the visual or audible range of the Court; the only evidence presented in the short colloquy following the conviction was that the attorney did not even know of the existence of the phone call, and hence could not "misbehave" nor have a

wrongful intent concerning a failure to return the call; moreover, the very reason the attorney came close enough to the Judge to allow the Judge to order the attorney into the Courtroom was because the attorney was trying to facilitate the federal judicial process rather than wilfully obstructing it. The attorney personally and informally called on the Judge to alert him to the fact that the next day a continuance would be sought and the "doctor's excuse" on behalf of the client Cancino would be presented. This personal call facilitated the Judge's trial calendar, and certainly did not obstruct in actuality anything whatsoever.

Because none of the foregoing elements were established, the conviction must be reversed. Any one of them being absent would render the conviction a nullity. Certiorari must be granted.

As to the critical element of intent in a federal criminal contempt, the U.S. 7th Circuit said in In Re Dellinger, 461 F. 2d 389, 400:

> ". . . an attorney possesses the requisite (wrongful) intent if he knows or reasonably should be aware in view of all of the

> circumstances, especially the heat of controversy, that he is exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth. . ."

If an attorney is charged with failure to return a telephone call that he was unaware of having been made, we suggest that the wrongful intent issue is woefully failing in establishment.

Since intent and misbehavior are intertwined here, there can be no misbehavior.

This conviction must fall.

We suggest that this Court grant certiorari to establish as a matter of federal due process of law that before anyone can be convicted of direct criminal contempt of Court and punished therefore it must be established beyond a reasonable doubt that there occurred (1) misbehavior (2) in the presence of the Court or so near thereto that (3) actually obstructed the administration of justice and (4) was done with a wrongful intent to so do. It is cases like the instant one, with lack of uniform national guidelines, that take the time of Courts and attorneys alike when such fundamental error such as committed by the instant District

Judge occurs. We suggest that a complete opinion by this Court adopting these standards is now ripe for promulgation. See, for example, the dire need for it as shown by In Re Buckley, 10 Cal. 3rd 237 (1973), allowing loose, vaguely developed state standards to sustain a direct criminal contempt conviction. Compare United States v. Meyer, 462 F. 2d 827 (D.C. Cir. 1972) and United States v. Meyer. In Re Hirschkop, Attorney, 346F. Supp. 973 (D.C.D.C. 1972), using the foregoing standards we now urge must be adopted nationally.

IV

THE ACTS ASSERTED TO BE CONTEMPTUOUS HERE, THE FAILURE TO RETURN A TELEPHONE CALL TO A COURT CLERK, MUST CALL FOR RULE 42 (B) PROCEEDINGS; THE COURT MUST HOLD A FULL FORMAL HEARING UPON NOTICE, WITH OPPORTUNITY TO DEFEND WITH COUNSEL WITHIN THE MEANING OF TAYLOR v. HAYES, 418 U.S. 488 (1974), JOHNSON v. MISSISSIPPI, 403 U.S. 212, 215 (1971), IN RE OLIVER, 333 U.S. 257, 275 - 276. AND ARGERSINGER v. HAMLIN, 407 U.S. 25 (1972).

It is clear that the Federal Judge here held no hearing, gave no chance for allocution, and summarily handled in about 18 lines of trial transcript the "contempt" adjudication. The issue is really simple. The only place for summary proceedings in contempt matters in federal law is the situation where immediate courtroom disruption is prevalent; the acts must occur directly in the visual and audible range of the Court. If the acts do occur in the immediate presence of the Court, but the adjudication is delayed the Court must hold a hearing. In Re Savin, 333 U.S. 257, 275 - 276; Johnson v. Mississippi, 403 U.S. 212, 215 (1971); Taylor v. Hayes, 418 U.S. 488 (1974); in any event, before sentence is imposed or adjudication

occurs, there must be an opportunity for allocution. Groppi v. Leslie, 404 U.S. 496, and the latter is an element of due process of law.

Since it is clear that the failure to return a telephone call, if an act of contempt at all, occurred fully outside any range of the Court, the information being conveyed to the Court by the clerk, the matter is simply not legally handled by direct contempt procedures, and Rule 42 (B) procedures must be applied. United States v. Marshall, 451 F. 2d 372, 376 (9th Cir. 1971).

It is amazing that one simple case can contain all of the federal violations of due process of law that herein occurred.

In the role of this Honorable Court in its exercise of supervisory powers over the lower Federal Court system, the conviction must be set aside. Taylor v. Hayes, 418 U.S. 488 (1974); Groppi v. Leslie, 404 U.S. 496.

It must be clear that we here assert no new novel issues of federal contempt law under Rule 42 (B) proceedings, for this Honorable Court has heretofore ruled that:

> "If some essential elements of the offense are not personally observed by the Judge, so that he must

> depend upon statements made by others for his knowledge about these essential elements, due process requires that the accused be accorded notice and a fair hearing. . ."

In Re Oliver, 333 U.S. 257, 275 - 276; cited with continuing approval in Johnson v. Mississippi, 403 U.S. 212, 215 (1971). In Johnson, this Court said:

> "Moreover, from this record we cannot be sure that Judge Perry was personally aware of the contemptuous action when it occurred. . ." (403 U.S. at 215).

It appears that bailiffs or marshals related to the Judge what had transpired. (Emphasis that of this Honorable Court, at 403 U.S. at 215.)

Likewise in the instant case, it appears that a law clerk made an early morning telephone call to the petitioner attorney's office, and was told the attorney was not in; when the call was not immediately returned, the District Judge lost his temper. See Page 2, opinion, for this judicial determination. Importantly, the events of not receiving an answer to the phone call were

related to the District Judge by his law clerk and cannot by any stretch of the elastic judicial imagination be converted into a direct criminal contempt of Court allowing the use of Summary Rule 42 (A) proceedings.

This conviction must be reversed. It could well be done by Per Curiam treatment without oral argument for the principles are too clearly established to be in serious question by anyone knowledgeable in the area of courtroom contempt in the federal domain.

On a further basis for certiorari, in view of the fact that the only legal alternative to the illegal coerced "contribution" to the District Judge's "library fund" was a day in jail, it would appear that Argersinger v. Hamlin, 407 U.S. 25 (1972) would require the opportunity to defend with counsel. Thus we pose as an issue in this case whether the commands of Argersinger v. Hamlin, 407 U.S. 25 (1972) require the opportunity to be represented by counsel in any criminal contempt where the only legal alternate to an illegal extraction of a monetary "contribution" is custodial time; a fine payable to the Government was not here imposed. The only legal possibility was incarceration and in order to avoid that, an illegal alter-

native was imposed by the Court. The representation by counsel for the legal alternative of incarceration is mandated by Argersinger v. Hamlin, 407 U.S. 25 (1972). Certiorari should be granted to establish this extension of Argersinger much as the requirement to trial by jury in Duncan v. Louisiana (1968), 391 U.S. 145 was extended to courtroom contempts in Bloom v. Illinois (1968), 391 U.S. 194.

It is clear under federal law that attempts to impose a sanction other than a monetary fine or custody meet with grief. Phelan v. Territory of Guam, 394 F. 2d 293, 297 (9th Cir. 1968) (attempts to strike attorney's name from indigent defense panel was beyond the power of the Court to impose as punishment in a criminal contempt proceeding and was a nullity).

Certiorari must be granted under the supervisory power of this Honorable Court over the lower Federal Court system.

V

BECAUSE OF THE EMOTIONAL INVOLVEMENT AND BIAS AND EMBROILMENT OF THE DISTRICT JUDGE, HE WAS REQUIRED TO RECUSE HIMSELF FROM ADJUDICATION BEING DELAYED FOR AT LEAST TWO HOURS AFTER THE COURT'S EMOTIONAL LOSS OF TEMPER IN CHAMBERS CAUSED BY OBTAINING NO ANSWER TO A TELEPHONE CALL. MAYBERRY v. PENNSYLVANIA, 400 U.S. 455 (1971). THUS, THE COURT WAS WITHOUT JURISDICTION TO PROCEED AND THE ATTORNEY WAS DENIED DUE PROCESS OF LAW.

The District Judge herein was judicially found by the United States Court of Appeals to have "lost his temper" because of the inability of a Court clerk he employed to successfully complete a purported telephone call to the attorney petitioner. Laying in wait, the District Judge summoned the attorney into his courtroom and summarily held that attorney, petitioner herein, in direct contempt of Court for not returning the phone call.

The record shows:

"MR. HANSON: I would like an explanation for this $50.00. I don't understand what this is.

THE COURT: Because you don't answer and return our phone calls . . ."

(Page 6, line 25 - Page 7, line 1, March 8, 1975 transcript.)

The emotional involvement of the District Judge toward an attorney whom he had never met before is shown in several places in the brief transcript:

1. Although torrential rains hit Los Angeles on Tuesday, March 6, 1973, forcing a delay in the Court appearance of petitioner attorney Hanson, Attorney Hanson telephoned the Court clerk to advise of the delay, which the Court acknowledged from the bench by stating:

"I understand this Hanson is on his way trying to get here, according to some secretary, but I tell you -- " (Page 5, March 6, 1973), he violently immediately thereafter ordered a bench warrant for the arrest of the late attorney, setting $100,000.00 bail (one hundred thousand dollars!) on that warrant. (Page 4, lines 14 - 15) (Page 5, lines 19 - 22).

2. He accused the attorney of lying:
"That is an absolute misstatement. It is a lie."
(Page 4, lines 19 - 20).
3. He threatened future failures to appear in the following language:
". . . but I tell you if you don't appear there will be a bench warrant out for your arrest, both you and this Cancino and his wife if he is -- if those are your two witnesses. . ."
(Page 8, lines 5 - 9) See also page 6, lines 8 - 9, March 8, 1973 transcript;
4. He continued the harangue thusly:
"Issue a bench warrant for the arrest of Roger Hanson, attorney at law. . . tell the Marshall's office I want him arrested and thrown in jail tonight."
(Page 9, lines 15 - 18, March 8, 1973 transcript.)
5. The Court did not even know the name of the petitioner:
". . . but I am not going to

stand for this nonsense of Dawson, or whatever, Hanson, ducking me like this. . ."
(Page 10, line 10 - 13).
6. Emblematic of his emotional involvement is the verbal slanderous language used against the attorney:
". . . and you had better get with it about these delay tactics, about not answering your phone calls. Every time I run into a bum like this, like you -- you are going to knuckle under and do it right like a lawyer should do or get out of the business. . . And I will help you get out if you want to keep insisting on it. . . "
(Page 8, line 2 - 11, March 8, 1973 transcript).
". . . It is a funny thing. You get some -- that is what they are, if they don't practice law like gentlemen, they practice like bums. I don't understand it . . . "
(Page 11, lines 16 - 18)

> Webster's New Collegiate Dictionary defines "bum" as someone leading an "idle, dissolute life . . . a drunken loafer" or alternately as "the buttocks."

Thus, while the attorney remained calm, and did not get embroiled with the Judge, it is clear that the Judge judicially was found by the 9th Circuit to have lost his temper (Opinion, Page 2), and became so embroiled with the attorney over the mere inablility of his clerk to complete a telephone call that he berated the attorney with foul language, ascribing to him the posterior region of the human anatomy, and alternately, describing him as a dissolute drunken loafer.

It is clear that a District Judge with this embroiled emotional adversary frame of mind could hardly be neutral and must constitutionally recuse himself from any delayed contempt adjudication. In Mayberry v. Pennsylvania, 400 U.S. 455, 464 - 465, Justice Douglas said:

> "Whether the trial be federal or state, the concern of due process is with the fair administration of justice. At times a judge has not been the image of 'the impersonal

> authority of law' (Offutt v. United States, 348 U.S. 11,17, 75 S. Ct. 11, 15, 99 L. Ed. 11) but has become so 'personally embroiled' with a lawyer in the trial so as to make the judge unfit to sit in judgment on the contempt charge." "The vital point is that in sitting in judgment on such a misbehaving lawyer, the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice."

In the case at bar, the embroilment was fully one-sided; the only embroilment was that of the United States District Judge toward the defenseless attorney who stood as captive to his abusive, foul language.

This District Judge was no more an impersonal representative of the fact determining process than the Court in Offutt or Mayberry or in Johnson v. Mississippi, 400 U.S. 212, 215:

> ". . . From that it is plain

that he was so enmeshed in matters involving petitioner as to make it m most appropriate for another judge to sit."

Trial before "an unbiased judge" is essential to due process. . ." See also Taylor v. Hayes, 418 U.S. 488 (1974).

Based on the decisions of this Honorable Court and the facts of this case, [1] certiorari must be granted. Mayberry v. Pennsylvania, 400 U.S. 455; Johnson v. Mississippi, 403 U.S. 212; Offutt v. United States, 348 U.S. 11.

1

The United States District Judge herein involved is no stranger to courtroom "contre-tempts" as the 9th Circuit (Page 1, Opinion) describes it; see United States v. Marshall, 488 F. 2d 1169 (9th Cir. 1974); for other history, see "The Benchwarmers" by Joseph C. Goulden (1974) New York. Weybright and Talley. Pages 12, 317 - 318, 319, 321, 322 - 323.

VI

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA AT LOS ANGELES, AT LEAST ONE UNITED STATES DISTRICT JUDGE MAINTAINS A "FUND" UNKNOWN IN ITS MAKEUP TO THE CHIEF JUDGE OF THE UNITED STATES 9th CIRCUIT COURT OF APPEALS INTO WHICH MONEY IS DIVERTED FROM ILLEGAL CONTEMPT OF COURT CONVICTIONS, IMPOSSIBLE TO REVIEW ON APPEAL, THAT LEGALLY SHOULD GO TO THE UNITED STATES GOVERNMENT IN THE WAY OF A FINE FOR "CONTEMPT" UNDER 18 U.S.C. 401 (1); THIS FUND IS ILLEGAL AS CONTRAVENING RULE 42 (A), F. R. CRIM. P. WHICH PROVIDES PUNISHMENT SUMMARILY FOR DIRECT CONTEMPT OF COURT WITH MONETARY FINES OR CUSTODAY. NO SUCH RULE ALLOWS THE COERCED "CONTRIBUTION" TO SUCH A LOCAL "LIBRARY" OR "ATTORNEY'S" FUND IN ORDER TO AVOID BEING SENT TO JAIL; UNDER ITS SUPERVISORY ROLE OVER THE LOWER FEDERAL COURT SYSTEM, THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO NULLIFY THIS ILLEGALITY AND ILLEGALLY OBTAINED CONTEMPT CONVICTION.

The small and complete record on appeal is herewith lodged with this Honorable Court.

Within its pages, it is clear that the District Judge purports to utilize Rule 42 (A) F. R. Crim. P. direct criminal summary

contempt procedures to "punish" acts that manifestly are not and neither could be proved to be contemptuous, nor do they occur in his presence. He forces "contributions" to a mystical fund to avoid the contemnor from finding himself thrown in jail.

Rule 42 (A) provides that the sole sanctions for direct contempt are either a fine, with the government impliedly obtaining the fine money, or custody in jail; nowhere is there provision to force coerced monetary contributions, and thus it is clear that the procedure is patently and illegally a contravention of Rule 42 (A) of the Federal Rules of Criminal Procedure, is a nullity, and must be stricken down.

The "fund" is apparently so mystical that two Circuit Judges have not heard of it, and neither has the visiting District Judge from Oregon. (Page 3, Opinion) Chief Judge Richard Chambers, in a self-quizzical contemplation of the fund's nature, concedes "trouble with its validity," and follows that with a quintet of interrogations not dredging up answers in his terse analysis of this District Court Rule 42 (A) transgression:

> "What sort of entity is the attorneys' fund. Doesn't it have trustees? Should the trustees be

> parties (to this appeal)? Can we order parties (the trustees) not before the Court to pay back the $50.00 when they do not know they are in Court? And, if it is a fine, shouldn't the Government be entitled to the money rather than having it diverted?"

At the terse March 8, 1973 confrontation where illegal summary procedures were invoked, the District Judge said:

> ". . . That will be $50.00 into the library fund or one night in jail. Now, do you hear me?"
> (Page 3, lines 16 - 17)
> "Now, you are going to pay that by 5:00 o'clock this afternoon or spend one night in jail, or pay $50.00 to the library fund, the so-called attorneys' fund. Do you hear me . . ."
> (Page 3, lines 22 - 25)
> ". . . you report to the Marshall at 4:45 or you bring in $50.00 as a contribution to the attorneys' fund by 4:45. . ."
> (Page 8, lines 15 - 16)
> "I find that you did make the $50.00

contribution, not fine, contribution, to the library -- now we call it the attorneys' fund -- in lieu of being arrested and confined for the evening or two.

In view of that contribution . . ."
(Page 18, lines 6 - 11)

"Thank you, Mr. Hanson, . . . for your contribution. As a matter of fact, I am sure the fund will enjoy your $50.00. . ."
(Page 23, lines 18 - 20)

Thus, it would appear that the Judge's use of the term "enjoy", as manifested by the fund's reaction to the "contribution," indicates a diversion of the money away from the Government coffers.

Such judicial maneuvers can not be condoned under Rules 42 (A) and 18 U.S.C. 401 (1).

The 9th Circuit found that the matter and whereabouts of the $50.00 could not be explained and "we might have trouble with the validity of requiring a contribution to the attorneys' fund" "if we were on the merits." (Page 3.)

Why the 9th Circuit felt constrained to not "get on the merits " of this illegality

baffles the mind of scholarship.

It is clear that this Honorable Court should grant certiorari in its supervisory role over the lower Federal Court system.

CONCLUSIONS

Because of the necessity to promulgate national criteria for invoking the summary direct criminal courtroom contempt power in the Federal Courts, pursuant to the four-fold criteria set forth in United States v. Seale, 461 F. 2d 345 (7th Cir. 1975) and adopted in the District of Columbia in United States v. Meyer, 462 F. 2d 827 (D.C. Cir. 1972) and on remand United States v. Meyer. In Re Hirschkop, Attorney, 346 F. Supp. 973 (D.C. D.C. 1972), certiorari should be granted. Further, to establish uniformity in the circuits in the key areas of (1) mootness vel non in attorney criminal contempt convictions and (2) in the area of requiring the filing of the Rule 42 (A) contempt order for direct criminal courtroom contempt, certiorari should be granted. Finally to establish guidelines for illegal contempt sanctions under Rule 42 (A), F. R. Crim. P. certiorari should be granted.

DATED: March 1, 1975

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESS CANCINO, *Plaintiff*, vs. WALTER E. CRAVEN, *Defendant*. In Re: ROGER S. HANSON, *Attorney at Law*.	No. 73-2151 OPINION

[February 6, 1975]

On Appeal from the United States District Court
for the Central District of California

Before: CHAMBERS and BROWNING, Circuit Judges, and EAST,* District Judge.

CHAMBERS, Circuit Judge:

Hanson says that this case is not mooted because of "the attending consequences that [his] conviction may have on his future career for a political office, for a judgeship, or for loss of clients." We cannot agree that the minor contretemps in which he was involved in the district court, in its context, created any possibility of impairing his political career, his possibilities of getting a judgeship, or that it conceivably could cause him to lose any clients.

We have heretofore ordered this appeal dismissed for failure to file it timely. On his petition for rehearing, an accommodating chief deputy clerk at Los Angeles has given Hanson an affidavit to give to this court to impeach the record on the filing stamp on the notice of appeal in the district court. If the filing stamp is

*The Honorable William G. East, United States District Judge for the District of Oregon, sitting by designation.

incorrect, it might well be that the chief deputy's formal confession of error should be first made to the chief judge of the district. Ordinarily, on a posture of the sort we have here, we would remand the case to the district court to consider what the record should be.

Here, however, we think we can consider mootness before we consider jurisdiction. If a case is moot, why labor jurisdiction?

Here is what happened in the district court:

On a petition for federal habeas corpus on a state conviction, the district judge had denied the writ without a hearing. On appeal, a division of this court remanded the case for hearing. Cancino v. Craven, 467 F.2d 1243 (9 Cir. 1972).

The district judge was trying to hold the required hearing. In March, 1973, apparently Cancino, who had served his time and was on parole, had the flu on the scheduled hearing date. But Hanson was slow in producing a doctor's certificate.

Out of nonappearance by Cancino and delayed appearance by his attorney, Hanson, the unhappy confrontation with the court happened. We only comment that the whole record indicates that Hanson is not too exacting of himself and the district judge lost his temper. Finally, at 11:55 a.m., Thursday, March 8, 1973, the Cancino matter came before the court. In the colloquy about the delayed hearing, the district judge announced to Hanson: "That will be $50.00 into the library fund or one night in jail." (Later the time for compliance was fixed at 4:45 p.m. the same day, and "library fund" was amended to read "attorneys' fund.")

On the day of the event, Hanson asked no stay from the district court. He asked no stay from any of the resident circuit judges. He apparently sought no stay from any circuit judge anywhere.[1] This is the sort of thing that I believe all circuit judges of this court are unanimous on: That in petty little contempts or alleged contempts there should be a stay pending

[1]This court's records show that March 8, 1973, was a court of appeals calendar day at Los Angeles, California. The two active circuit judges resident at Los Angeles were on that calendar. Also, three circuit judges not residents of Los Angeles were available in their Los Angeles offices. The elevator from the district court's second floor to the 16th floor occupied by the court of appeals takes less than one minute.

appeal. I have never seen one denied. But Hanson, without seeking a stay, paid the $50.00 into the attorneys' fund.[2] If he had served the day, we might take a different view.

If we were on the merits, we might have trouble with the validity of a procedure of requiring a contribution to the "attorneys' fund." What sort of an entity is the attorneys' fund? Doesn't it have trustees? Should the trustees be parties here? Can we order parties (the trustees) not before the court to pay back the $50.00 when they do not know they are in court? And, if it is a "fine," shouldn't the government be entitled to the money rather than having it diverted?

After further examination of the record, we find this: There is serious doubt that a final order as required by Section 4(b), F.R.Ap.P. was ever entered in the case. So, if Hanson could get by mootness, he would be right back up against jurisdiction.

In such sequences as we have here, the bar is at its best in coming to the rescue of not only the oppressed lawyer, but the allegedly oppressed one. Hanson chose to represent himself. Thus, he has stumbled.

This court cannot go to the hustings for Hanson in his quest of political office, cannot sponsor him for a judgeship, or advise the clients considering hiring him (about which he is concerned). But if anyone wants to know more about the case, let it be known that it did not amount to much.

The order of dismissal is amended to read, "The case is dismissed for mootness. And, the petition for rehearing is denied."

[2]The direction from the bench occurred about 12:05 noon. The final direction was that the sum be paid by 4:45 p.m. that day or the one day sentence would be effective. In the record, Hanson says he made the payment at 1:00 p.m. the same day. Thus, when he made the payment there were three hours and forty minutes of free time remaining.

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